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Supreme Court of the United States.

OCTOBER TERM, 1960.

SUCRS. DE A. MAYOL & CO., INC.,
Petitioner,
v.
JAMES P. MITCHELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Sucrs. de A. Mayol & Co., Inc., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 30, 1960.

Citations to Opinions Below.

The opinion of the judge of the District Court of Puerto Rico is reported in 166 F. Supp. 184, and the judgment of the said District Court was entered on December 11, 1958. The opinion of the Court of Appeals (R. 417) has not yet

been reported and is printed in the record in R. 417, and is printed in Appendix A attached hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 30, 1960 (R. 423). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

Questions Presented.

1. When interstate commerce ceased.

Whether the Court of Appeals has correctly interpreted the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. secs. 201 *et seq.*), and the decision of this Court in *Walling* v. *Jacksonville Paper Co.* (1943), 317 U.S. 564-572; and *Higgins* v. *Carr Brothers Co.*, 317 U.S. 572, in holding that goods imported and consigned to a local merchant for local intrastate distribution do not cease their interstate journey when they are delivered *inside* the merchant's warehouse, but that they continue in commerce until they are stored or stacked in bins or shelves in the same warehouse.

2. Whether the Court of Appeals and the District Court correctly interpreted the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. secs. 201 *et seq.*), in failing to apply the 13 (a) (1) exemption of the Act to employees engaged in a "local retailing capacity" or "in the capacity of outside salesman."

3. Whether, conceding the correctness of the decision of the Court of Appeals to the effect that the goods *came to rest when stored in the bins or shelves* of the warehouse, it was not manifestly erroneous not to exclude from

the coverage of the Act the chauffeurs and their helpers who concededly did not handle the goods until after their interstate journey had been concluded.

Statutes and Rules Involved.

The statutory provisions involved are sections 3 (b) and 13 (a) (1) of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U.S.C. secs. 201 *et seq.*). The pertinent provisions of these sections are printed in Appendix B attached hereto.

Statement.

The respondent, Secretary of Labor of the United States, brought an action (R. 3) under the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. secs. 201 *et seq.*), to enjoin the petitioner from violating the minimum wage and overtime provisions of the Act.

The petitioner has for many years operated a retail department store in the shopping center of San Juan, Puerto Rico (R. 121, 193), where it sells a heterogeneous category of household goods, including hardware, paint and paint products, toilet articles, sporting goods, furniture, kitchen ware, etc. (R. 121, 193).

The major part of the merchandise which the petitioner sold is purchased by it either directly from outside of Puerto Rico or through local distributors for stateside manufacturers. All goods purchased by petitioner are consigned to it and upon arrival, with rare exceptions (R. 90), are transported from the piers or docks to its store or to its two warehouses. The goods are moved from the

piers or docks to petitioner's retail store or warehouses by an independent carrier (R. 88-89) and delivered by said independent carrier and his employees inside the store or the warehouses (R. 89).

The goods consigned to petitioner, upon arrival and until delivered on the floors of its store or warehouses, are not handled in any way by petitioner's employees (R. 90).

After the goods are stored inside the warehouses and storerooms the work of petitioner's warehouse employees commences, and that consists of stacking or arranging the goods in an orderly fashion to fill the needs of its store and for sale to its customers (R. 90).

All of the goods imported by petitioner are purchased by it and become its property for sale to the general public (R. 44-45). Petitioner does not order goods consigned to or earmarked for particular customers (R. 151, 242).

None of the goods purchased by petitioner for sale are exported or shipped out of Puerto Rico and all are sold locally (R. 254).

Petitioner maintains it is not engaged in interstate commerce nor in the production of goods for commerce. Petitioner furthermore maintains that, even if it were engaged "in commerce," its warehouse employees were not so engaged.

As a special defense petitioner set up the white-collar exemption of section 13 (a) (1) of the Act, which excludes employees engaged in a local retailing capacity and as outside salesmen.

The District Court held that the petitioner and its employees, without identifying the particular employees, were "engaged in commerce," and denied the applicability of the exemption to defendant or to any of its employees.

The District Court in its findings (R. 365-368) in effect decided that forty-five of petitioner's employees were en-

gaged in interstate commerce. Since it failed to exclude from its broad order and judgment (R. 368-369) any of the forty-five employees referred to, the decision necessarily covers the petitioner's warehousemen who worked in the storing and classification of the goods after they were delivered *inside* its warehouse. The District Court also made no specific ruling as to those employees alleged by petitioner to be exempted from the Act by virtue of the provisions of section 13 (a) (1). These employees were engaged in a local retailing capacity. The District Court also failed to exclude chauffeurs and chauffeur helpers, who admittedly never came in contact with the goods until after they had come to rest.

The Court of Appeals affirmed the judgment of the District Court (R. 417-423) in a brief opinion, and noted that—

> "We accept the view that interstate commerce ceases when the goods come to rest. [Citations omitted.] The difficulty arises in defining the resting point. . . . In the case at bar *commerce clearly ended at the warehouse.* The question presented, therefore, is *where; within the warehouse, the goods come to rest* in such a way as to terminate the flow of commerce. . . . In our opinion the placement of a shipment in an elevator, or on the floor by a doorway, results in only a 'temporary pause'. We believe we were correct in Dopeneech in stating that the mingling with other goods[1] in the warehouse is the event which brings about a state of rest, and that this occurs when the goods have been placed in their intended destination as stock."[2] (Emphasis supplied.) (R. 419-420.)

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[1] This presupposes that the goods are ever mingled.

[2] It can only be inferred that the Court meant the bins, shelves or other appropriate storage place in the same warehouse.

Reasons for Granting the Writ.

Point 1. Where Commerce Ceases.

The petitioner submits that the ruling of the Court of Appeals is in conflict with previous rulings of the same Court, with rulings of this Court, and with rulings of the Courts of Appeals in other circuits.

The decision of the Court of Appeals to the effect that the flow of commerce does not end upon the arrival of the goods at the petitioner's warehouse, but rather a few feet or yards away or when they are stacked in shelves or bins, it is submitted will not be conducive to settling the rule of law applicable under such everyday occurrences throughout the commercial life of the country. On the precise point, the rule laid down by every court in every circuit and by the state courts which have had occasion to pass upon this question has been "that goods imported from without the state and destined for local distribution come to rest, and thereby end their interstate journey when delivered in the local merchant's warehouse." Cases *infra*, p. 9.

To extend the journey a few feet further *inside* a warehouse seems unrealistic and based upon suppositions such as that all merchant's warehouses are provided with bins or shelves, or that there is commingling, or upon considerations fraught with technicalities and niceties extremely difficult, if not impossible, of proper appraisal for merchants throughout the nation.

Contrary decisions of other courts of long standing, based upon practical considerations, should not be so lightly set aside by the introduction of new dogmas of doubtful value.

The decision of the Court of Appeals, if not reviewed and the precise point settled by this Court, will necessarily

give rise to considerably more conflict between the different circuits concerning the applicability of the Act to local warehouses receiving goods in interstate commerce.

The ruling of the Court of Appeals is directly contrary to that of most of the other circuits, including the First Circuit. The Court of Appeals had previously in *Walling v. Silver Bros. Co.*, 136 F. 2d 168, at 171, ruled:

> "'It, therefore, follows that those employees who handle goods *in the warehouse* and prepare them for local shipments are not within the purview of the Act.'' Mahoney, J., 136 F. 2d 171. (Emphasis supplied.)

Although the above language of the Court of Appeals by itself does not indicate at what point the warehouse employees in the *Silver Bros.* case "*handled the goods*," the recital of the District Court's findings and conclusions at page 169 of 136 F. 2d by the Court of Appeals serves as a background for what the First Circuit approved in affirming the District Court.

> ". . . New Hampshire employees who handled goods in appellee's warehouse *after they had been received therein*,[3] and persons employed in the clerical department, were all held to be in intrastate commerce and were not within the provisions of the Act." 136 F. 2d 169. (Emphasis supplied.)

The decision of the Court of Appeals is also in conflict with the decision of the Seventh Circuit in *Walling v. Goldblatt Brothers, Inc.*, 128 F. 2d 778, 783. In the latter case the Seventh Circuit ruled:

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[3] The phrase *received therein* would not necessarily imply placed on the bins or shelves.

> "Since upon delivery of the goods at defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent *moving and storing of the goods in the warehouses* are not in commerce." 128 F. 2d 778. (Emphasis supplied.)

This Court denied certiorari in the above case, 318 U.S. 757.

The Supreme Court of Puerto Rico in a case involving the precise warehouse employees of the petitioner herein, *Ortiz* v. *Sucrs. de A. Mayol & Co., Inc.*, 78 P.R.R. 534, expressed an opinion also in conflict with that of the Court of Appeals when it held:

> "As may be seen, there is evidently a conflict between the case of Walling v. Consumers Co., and the case of Martin v. Bouldin, supra. The case of Higgins v. Carr, supra, does not help us to settle it because it merely says that when the goods were unloaded the interstate transportation had already ceased, without stating the exact moment when the interstate transportation had ended. In any event, the aforesaid conflict is academic in this case, *since here the goods had been unloaded and placed in defendant's warehouse when plaintiff handled them.* In the light of the authorities cited herein, it is clear that when plaintiff handled the goods in question, they had ceased to be in commerce and therefore he was not engaged in commerce within the meaning of that term in the statute." *Ortiz* v. *Sucrs. de A. Mayol & Co.*, 78 P.R.R. 534, at p. 540.

The decision of the Court of Appeals is therefore in conflict with decisions of the First Circuit and other cir-

cuits and state courts that have consistently held that interstate commerce comes to an end when goods, imported by a local merchant for local distribution, are delivered at the warehouse. *Higgins* v. *Carr Brothers Co.* (1943), 317 U.S. 572, 87 L. ed. 468, 63 S. Ct. 337. *Jewel Tea Co.* v. *Williams* (1941; C.C.A. 10th), 118 F. 2d 202. *Jax Beer Co.* v. *Redfern* (1941; C.C.A. 5th), 124 F. 2d 172. *General Tobacco & Grocery Co.* v. *Fleming* (1942; C.C.A. 6th), 125 F. 2d 596, 140 A.L.R. 783. *Walling* v. *Goldblatt Brothers, Inc.* (1942; C.C.A. 7th), 128 F. 2d 778 (writ of certiorari denied in (1943) 318 U.S. 757, 87 L. ed. 1130, 63 S. Ct. 528). *Walling* v. *Sanders* (1943; C.C.A. 6th), 136 F. 2d 78. *Walling* v. *Silver Bros. Co.* (1943; C.C.A. 1st), 136 F. 2d 168. *Gerdert* v. *Certified Poultry & Egg Co.* (1941; D.C.), 38 F. Supp. 964. *Drake* v. *Hirsch* (1941; D.C.), 40 F. Supp. 290. *Klotz* v. *Ippolito* (1941; D.C.), 40 F. Supp. 422. *Eddings* v. *Southern Dairies* (1942; D.C.), 42 F. Supp. 664. *Prescription House* v. *Anderson* (1941; D.C.), 42 F. Supp. 874. *Moses* v. *McKesson & Robbins* (1942; D.C.), 43 F. Supp. 528. *Walling* v. *Mutual Wholesale Food & Supply Co.* (1942; D.C.), 46 F. Supp. 939. *Walling* v. *Sanders* (1942; D.C.), 48 F. Supp. 9 (affirmed in (1943; C.C.A. 6th) 136 F. 2d 78). *Serio* v. *Dee Cigar & Candy Co.* (1942), 243 Ala. 306, 9 So. 2d 909. *McDaniel* v. *Clavin* (1942; Cal. App.), 128 P. 2d 821 (affirmed in (1943), 22 Cal. 2d 61, 136 P. 2d 559). *Rahgo* v. *Cities Service Oil Co.* (1942), 177 Misc. 1059, 33 N.Y.S. 2d 42. See Annotation 149 A.L.R. 386.

The more recent cases holding to the same effect are *Mitchell* v. *Livingston Thebout Oil Co.* (1958; C.A. 5th), 256 F. 2d 757. *Mitchell* v. *C & P Shoe Corp.* (1959; U.S. D.C. S. Fla., not officially reported), 14 Wage & Hour Cases 241. *Barnard* v. *Thomas* (Fla. Civil Court of Record, Dec. 17, 1959, not officially reported), 14 Wage & Hour Cases 396.

Point 2. Local Retailing Employees—Section 13 (a) (1).[4]

The record shows that José Juan Picart and other employees of petitioner included in the forty-five held to be covered worked on the third floor of the *retail store* (R. 160, 161, 312, 313, 314). They opened boxes when they reached the third floor (R. 160-161) and placed the goods on the store shelves as supplies for the retail clerks to sell.

In connection with the activities of said employees the District Court had no doubts:

> "The Court: I believe that these employees testified that all the merchandise that was stored upstairs in that third floor, he said, the third floor in which he opened the cases, the boxes, was to be placed on the counters. No doubt that was for the retail sales of the establishment." (R. 312.)

And after a further discussion by the District Judge, counsel for respondent concedes that the above employees were employed in the retail store.

> "The Court: Yes, it has been testified to that these two buildings are inter-connected, *and I believe the plaintiff is not denying or will concede that all the business in 201 and 203 is generally a retail business.* That what the government contends *is a wholesale business is the business that's being conducted through 204 and Santa Isabel where they have these big orders, where the big customers are concerned,*

[4] 13 (a) (1): "The provisions of sections 6 and 7 shall not apply with respect to any employee *in a . . . local retailing capacity*, or in the capacity of outside salesman . . ."

and 204. A. 204 is the warehouse in front." (R. 313.)

"The Court: But generally isn't that an outlet for the store in general, for the retail store? Sporadic sales may be made there of wholesale, but generally that's an outlet of the retail store.

"Mr. Bosch: Yes, we could say that." (R. 314.)

It is difficult to understand, after such a perfect grasp by the District Court of the activities of the above employees and the admission of respondent's counsel, how that Court could include said employees in its sweeping judgment and how the Court of Appeals also sweepingly affirmed said judgment.

The evidence as to the outside salesman and the admission that he was such by counsel for respondent (R. 279) brought him squarely within the exemption. Neither the District Court nor the Court of Appeals, however, saw fit to pass upon it.

Point 3. Truck Drivers and Helpers.

After the close of the respondent's case counsel for petitioner initiated a series of questions to elicit evidence to support the exemptions under section 13 (a) (1) of the Act. (R. 279-284). These defenses had been set up in petitioner's answer (R. 6). The Court considered this evidence unnecessary and prevented counsel for petitioner from further pursuing questioning on the exemption, stating that no evidence had been presented as to other employees, as follows:

"The Court: Let us save time. There is another thing. No doubt the government, that is, the plaintiff

has made no case as to these employees you are referring to. They have not offered any evidence as to that for their cause of action. *All they have relied on is these employees of the warehouse*, all of whom testified they are underpaid and worked overtime, so you don't need to bring any evidence as to these other employees. *You should confine yourself to those who have been put in evidence, because otherwise I can not issue an injunction as regards the work of these other employees, if there is no evidence as to that.* The fact that they answered your interrogatories, 'Well, we claim that these persons are covered by the Act.' *That's not evidence.* So we would be losing time showing that these persons are executives or are employed in an administrative capacity, if there is no evidence as to that." (R. 284.)

In view of the District Court's understanding of the case and the ruling by the District Judge that counsel for petitioner should confine himself to those employees who had been put in evidence, because otherwise the District Judge *could not issue an injunction* as regards the work of other employees if there was no evidence as to that, counsel for petitioner, relying on such statement and such ruling, desisted from eliciting further testimony on the exemptions.

Notwithstanding the above, the District Court in issuing the injunction and in its judgment did not exclude from its sweeping provisions the employees as to whom no evidence was introduced. The Court of Appeals also failed to pass upon this phase of the case.

It becomes apparent, therefore, that the judgment of the District Court should have been remanded for clarification of its scope and for the exclusion from its provisions of those employees as to whom no evidence was presented.

Conclusion.

The petitioner submits that the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit is proper for the reasons above outlined, and that the same should be granted.

San Juan, Puerto Rico, this 20th day of September, 1960.

Respectfully submitted,

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Appendix A.

OPINION OF THE COURT.

June 30, 1960.

ALDRICH, *Circuit Judge*. This action was brought by the Secretary of Labor under section 15(a)(2) of the Fair Labor Standards Act of 1938, 28 U.S.C. §§201-19, in the District Court for the District of Puerto Rico to enjoin defendant from violating the minimum wage and overtime provisions of the act with respect to employees who (a) ordered, made payments for, and kept records of goods received from outside of Puerto Rico; (b) operated its telephone switchboard; (c) received, checked and stored goods awaiting sale and later distribution in Puerto Rico; (d) performed custodial and janitorial service. Defendant conceded at the trial that with respect to many of its employees, it had not met the minimum wage and overtime requirements of the act, but denied that its operations were subject to it. The court issued an injunction, accompanying it with an opinion resolving all issues against the defendant.

Defendant is engaged in the importation and distribution of hardware, paint, plumbing, miscellaneous building supplies, electrical fixtures, furniture, household equipment, and other goods, in San Juan, Puerto Rico. It has two warehouses. In another building it has its store and office, and additional warehouse facilities. Eighty per cent of the goods sold come from the continental United States. The two questions presented are whether the employees mentioned are "engaged in commerce" within the meaning of the act with respect to these goods, and, if so, whether defendant is exempt under section 13(a)(2) as a "'retail . . . establishment' . . . 75 per centum of whose annual dollar volume of sales of goods . . . is not for resale and

is recognized as retail sales . . . in the particular industry." Defendant also complains of the form of the injunction.

Defendant's imported merchandise arrives at the docks in packages consigned to it. These are delivered to its warehouses by an independent trucker. In one warehouse the trucker's employees place the packages in an elevator; in the others they are placed inside the door on the floor of the building. The packages are opened by defendant's employees, who then transport the goods to the appropriate storerooms.[1] In the building containing the elevator the individual goods are checked against invoices in the storerooms. In the others the checking is done before delivery to the rooms. The court held that every employee concerned with the goods up through the point of placing them in the shelves came under the act.

The first question requires a finding of what employees, if any, perform operations which can be considered to be "in commerce." *McLeod* v. *Threlkeld*, 1943, 319 U.S. 491, 497; *A. B. Kirschbaum Co.* v. *Walling*, 1942, 316 U.S. 517, 524. This, in turn, depends on the limits of interstate or "foreign" movement. We accept the view that interstate commerce ceases when the goods come to rest. See, *e.g.*, *Mitchell* v. *Livingston & Thebaut Oil Co., Inc.*, 5 Cir., 1958, 256 F.2d 757, 760; *James V. Reuter, Inc.* v. *Walling*, 5 Cir., 1943, 137 F.2d 315, 318, *rev'd on other grounds*, 1944, 321 U.S. 671. The difficulty arises in defining the resting point. The Supreme Court has made it apparent that commerce carries through any "temporary pause," and continues until the originally contemplated journey reaches its end. *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U.S. 564, 568.

[1] Certain special, or "prior," orders are set apart for the customers. Much of defendant's brief is an attempt to show that the district court erred with respect to these orders. We do not reach that subject.

In that case the court held that various employees connected with the handling of interstate goods within a warehouse were in commerce because the goods did not come to rest until the completion of a further journey beyond it. In other words, commerce continued *through* the warehouse. In the case at bar commerce clearly ended *at* the warehouse. The question presented, therefore, is where, *within* the warehouse, the goods come to rest in such a way as *to terminate* the flow of commerce. Singularly, this question has seldom been considered. It is true that one court has held that, "Since upon delivery of the goods at defendant's warehouse, interstate movement has ceased, employees concerned solely with subsequent moving and storing of the goods in the warehouses are not in commerce." *Walling* v. *Goldblatt Bros., Inc.*, 7 Cir., 1942, 128 F.2d 778, 783, *cert. den.*, 318 U.S. 757. Even there, however, the court's attention seems to have been focused on the question of whether the goods came to rest at the warehouse, or only later at the retail stores to which they were eventually delivered. 128 F.2d at 782-83. If the court did specifically consider the present question, it at least gave no reason why the line should be drawn at the point where the goods entered the building.

In *Domenech* v. *Pan American Standard Brands, Inc.*, 1 Cir., 1945, 147 F.2d 994, 995, we observed that "the 'state of rest' doctrine . . . holds that the interstate journey ends when the goods come to rest in the wholesaler's warehouse and are intermingled with the mass of property there." *Cf.* ". . . after the property has arrived and has become commingled with the mass of property within the State." *A. L. A. Schechter Poultry Corp.* v. *United States*, 1935, 295 U.S. 495, 543. The journey obviously does not terminate simply when the destined owner takes possession (or defendant could solve all its troubles by sending a single employee to the pier), nor should it when the prop-

erty crosses some particular threshold. In our opinion the placement of a shipment in an elevator, or on the floor by a doorway, results in only a "temporary pause." We believe we were correct in *Domenech* in stating that the mingling with other goods in the warehouse is the event which brings about a state of rest, and that this occurs when the goods have been placed in their intended destination as stock. *Cf. McComb* v. *W. E. Wright Co.*, 6 Cir., 1948, 168 F.2d 40, 42; *cert. den.*, 335 U.S. 854. It follows that the court properly concluded that those employees concerned with receiving, checking, and storing goods within the warehouse are "engaged in commerce."

Under these circumstances no difficulty arises with respect to the other classifications of employees which the court found to be directly connected with these goods while they were in commerce: (a) clerical help concerned with interstate shipments, *Mitchell* v. *E. G. Shinner & Co.*, 7 Cir., 1955, 221 F.2d 260; *Montgomery Ward & Co., Inc.* v. *Antis*, 6 Cir., 1947, 158 F.2d 948, *cert. den.*, 331 U.S. 811; *cf. Walling* v. *Goldblatt Bros., Inc., supra;* (b) telephone operator, *Mitchell* v. *Joyce Agency, Inc.*, 1955, 348 U.S. 945, *reversing*, 7 Cir., 1954, 211 F.2d 241, and *affirming Durkin* v. *Joyce Agency, Inc.*, 1953, D.C.N.D. Ill., 110 F. Supp. 918; *Mitchell* v. *E. G. Shinner & Co., supra;* (c) custodial employees in warehouses, *Crook* v. *Bryant*, 4 Cir., 1959, 265 F.2d 541; see *Overstreet* v. *North Shore Corp.*, 1943, 318 U.S. 125.

We turn, therefore, to defendant's claim of exemption on the ground that "75 per centum of [its] annual dollar volume of sales of goods . . . is not for resale and is recognized as retail sales . . . in the particular industry." Section 13(a)(2), 29 U.S.C. §213(a)(2).[2] On this the bur-

[2] For present purposes we are assuming, in defendant's favor, that in all other respects it is a "retail establishment" qualified to claim this exemption.

den is on the defendant. *Arnold* v. *Ben Kanowsky, Inc.*, 1960, 361 U.S. 388, 393-94. Admittedly 21.6% of defendant's annual sales were to retailers for resale; at least 3.6% more were to building contractors for purposes other than "residential or farm building construction, repair, or maintenance"; 4.1% were to building contractors for those particular purposes; and 7.7% were made to government agencies under contract. In view of the admitted 21.6%, defendant must show that each of these other categories was not for resale, and, in addition, was recognized as retail in the particular industry.

In *Ben Kanowsky* the court held that parts sold to a manufacturer to be incorporated into airplanes to be sold as finished products were sold "for resale." 361 U.S. at 394. It found in section 3(n) of the act, ("'Resale' shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance,") 29 U.S.C. §203(n), "an intent to classify other sales for use in articles to be sold as 'resale.'" 361 U.S. at 394, n. 10. We see no difference between the resale of a completed article containing a defendant's parts, and the incorporation of a defendant's material, no doubt at a price,[3] into the property of a contractor's customers. Consequently, another 3.6% must be added to the admitted 21.6% of defendant's goods which were sold for resale. The defendant's case, accordingly, falls before we reach some potentially interesting questions raised by the court's exclusion of defendant's proffered expert testimony as to the nature of the remaining contested categories.

There remains a question as to the form of the injunction. Defendant objects that the wording is general and

[3] *Cf. Mitchell* v. *Sherry Corine Corp.*, 4 Cir., 1959, 264 F.2d 831, *cert. den.*, 360 U.S. 934, where sale of food to an airline for consumption by passengers was held to be for resale even though there was no separate specific charge made for food.

fails to specify particular employees or particular employments. It is true that civil contempt may result even though the defendant has acted in good faith. *McComb* v. *Jacksonville Paper Co.*, 1949, 336 U.S. 187, 191. But this is not to say that an injunction may not be couched in general terms. Particularly is this proper where a defendant is independently advised of what the court means to include. The district court's supporting opinion here made clear which activities were found to be covered. That the defendant understood the scope of the injunction is evidenced by the fact that the description of these activities in the first sentence of our opinion was lifted bodily from defendant's brief. Some compromise must be effected in a decree between the need for articulation, and the need for sufficient comprehensiveness to prevent "easy evasion." *McComb* v. *Jacksonville Paper Co.*, 1949, *supra*, at 193; see *Aetna Finance Co.* v. *Mitchell*, 1 Cir., 1957, 247 F.2d 190. The objection to the form of the injunction is without merit.

Judgment will be entered affirming the judgment of the District Court.

Appendix B.

FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED.
(52 Stat. 1060, 29 U.S.C. Sec. 201 *et Seq.*)

Sec. 3. As used in this Act—

(a) . . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

. . . . . .

Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a

bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Secretary of Labor * * *); . . .

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No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1960

SUCRS. DE A. MAYOL & CO., INC., PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 184. The opinion of the Court of Appeals is reported at 280 F. 2d 477, and is printed in Appendix A of the Petition, pp. 14–19.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1960. The petition for a writ of certiorari was filed on September 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that goods shipped from out-of-state to a wholesaler's warehouse do not come to rest when they are deposited by an independent trucker on the elevator or on the floor of the warehouse, but remain "in commerce," within the meaning of the Fair Labor Standards Act, until they have reached their intended destination as stock within the warehouse.

2. Whether this Court should review the finding below that petitioner failed to establish by a preponderance of the evidence that any of the employees in question met the tests established by the Administrator in the regulations, promulgated pursuant to Sec. 13(a)(1) of the Fair Labor Standards Act, to qualify for exemption as "employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman".

3. Whether the injunction restraining petitioner from further violations of the Fair Labor Standards Act with respect to its employees who are "engaged in commerce" must further specify the particular employees who are covered by the order, when the opinions below clearly indicate the classes of employees who are intended to be included.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), the pertinent

provisions of which are set forth in Appendix B of the Petition, pp. 19–20.

STATEMENT

The Secretary of Labor brought this action to enjoin petitioner from violating the minimum wage and overtime provisions (Sections 6, 7, and 15(a)(2)) of the Fair Labor Standards Act with respect to its employees who are engaged "in commerce" within the meaning of the Act (R. 3–4). Petitioner conceded non-compliance with these provisions, but denied that its operations were subject to the Act (Pet. 14).

Petitioner is engaged in the importation and distribution of hardware, paint, plumbing, miscellaneous building supplies, furniture, electrical fixtures, household equipment, and other goods, in San Juan, Puerto Rico (Pet. 14, R. 366). Its principal place of business houses its central office, a retail store and warehouse facilities, and petitioner maintains two additional warehouses (*ibid.*).

Eighty percent of the goods sold by petitioner come from the continental United States (*ibid.*). Imported merchandise arrives at the docks in packages consigned to petitioner, and is delivered to its warehouses by an independent trucker (Pet. 15). Merchandise delivered to petitioner's principal place of business is deposited by the trucker on an elevator, and one of petitioner's employees takes it up on the elevator to the third floor warehouse, where other employees receive it, open the packages, sort the goods and transport them to storerooms maintained by the various

departments (Pet. 15, R. 76, 89, 160). When the goods arrive at the appropriate department, they are checked against the invoices (Pet. 15, R. 329). Merchandise delivered by the carrier to either of petitioner's other warehouses is deposited by the trucker on the floor of the warehouse just inside the door (Pet. 15, R. 87, 89). There, petitioner's employees receive and check the goods, sort them, and remove them to appropriate storage places within the warehouse (Pet. 15, R. 137, 147), or separate and set aside merchandise designated for immediate delivery to particular customers pursuant to their previous orders (R. 137, 139, 151, 335).

The District Court held that petitioner's employees who (a) ordered, made payments for, and kept records of goods received from outside Puerto Rico; (b) operated its telephone switchboard; (c) received, checked and stored goods awaiting sale and later distribution in Puerto Rico; and (d) performed custodial and janitorial services in petitioner's office and warehouses, were engaged in commerce within the coverage of the Act (R. 366–367). The District Court also held that petitioner had failed to establish that any of these employees were exempt from the Act under Section 13(a)(1) as being employed in a bona fide executive, administrative, professional or local retailing capacity or in the capacity of outside salesman (R. 364). Accordingly, the court issued an injunction restraining petitioner from employing in violation of specified sections of the Act "any of its employees engaged in commerce, as defined by the

Act" (R. 368–369). The Court of Appeals affirmed, holding "that those employees concerned with receiving, checking, and storing goods within the warehouse," as well as the other employees who were "directly connected with these goods while they were in commerce," were "engaged in commerce" under the Act (Pet. 17), and that petitioner's objection to the form of the injunction was without merit, particularly since the "district court's supporting opinion made clear which activities were found to be covered" and defendant manifestly "understood the scope of the injunction" (Pet. 19).

The District Court rested its coverage ruling on its finding that these employees handled "merchandise received from abroad and destined for certain customers either on special orders or otherwise" (R. 362–363), and that "the evidence has established * * * that said employees performed the aforesaid operations on all merchandise received at the warehouses from time to time, be it for replenishing defendant's stock in trade or to fill special orders, or serve particular clients and that no segregation existed between one purpose or the others as regards the time devoted to each by any of the employees" (R. 364). It concluded that the evidence as to the regular and unsegregated time spent by the employees in the handling of special or "prior" order merchandise was sufficient to make it unnecessary, "under the facts of this particular case," to determine precisely where "the lawful end of the flow of the stream of commerce appears to be" (R. 363–364). The Court of Appeals rested its affirmance on

the ground that, under the principles of *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, the interstate movement of the merchandise "does not terminate simply when the destined owner takes possession" or "when the property crosses some particular threshold" but continues until "the goods have been placed in their intended destination as stock," and that "the placement of a shipment in an elevator, or on the floor by a doorway, results in only a 'temporary pause.'" (Pet. 16–17). The Court of Appeals found it unnecessary, therefore, to pass on the petitioner's contest of the trial court's factual findings with respect to special or "prior" orders (Pet. 15, fn. 1).[1]

ARGUMENT

The decision below correctly applies principles well-settled by this Court's decisions; it does not conflict, but on the contrary is in accord, with the decisions of other Courts of Appeals rendered since this Court's controlling decision in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564. The *Jacksonville Paper* decision provides adequate guides for resolving the coverage question presented by the particular facts here, and this case presents no current general problem warranting further review.

1. The ruling below that the "commerce" coverage of the Fair Labor Standards Act extends to the handling of goods received from out-of-state sources

[1] In the event that certiorari should be granted, respondent would urge that the District Court's "prior orders" ruling was correct and affords an additional or alternative ground for affirmance of the decision below.

until "the goods have been placed in their intended destination as stock" within the warehouse represents a correct application of the principle established by the *Jacksonville Paper* decision, that "[n]o ritual of placing goods in a warehouse can be allowed to defeat * * * the purpose of the Act [which] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (317 U.S. at 567, 568). It is not until the goods are so placed and thus "intermingled with the mass of property" in the warehouse (*Domenech* v. *Pan American Standard Brands, Inc.*, 147 F. 2d 994, 995 (C.A. 1) (cited in the opinion below, Pet. 16), that they become a part of the stock held by petitioner "for local disposition" (cf. *Jacksonville Paper, supra*, 317 U.S. at 570).

This ruling accords with the consistent decisions of the other Courts of Appeals which have passed on this specific question since the *Jacksonville Paper* decision. *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, 42 (C.A. 6), certiorari denied, 335 U.S. 854 (holding that "both the unloading *and storing* of goods received in interstate commerce are covered by the Act," emphasis added); *Mitchell* v. *Royal Baking Co.*, 219 F. 2d 532, 533 (C.A. 5) (rejecting the contention that the interstate movement of incoming merchandise ended when the employees received the merchandise from the carrier at the warehouse unloading platform, and ruling that the Act covered warehouse employees whose duties were to have the merchandise "checked, moved inside and spotted in the warehouse"); *Mc-*

Comb v. *Herlihy*, 161 F. 2d 568 (C.A. 4) (which reversed the district court's ruling against coverage of employees who did no unloading but only moved the goods to their storage places (see 11 Labor Cases, para. 63,218, fdg. of fact no. 2), and held that such warehouse employees "took part in the interstate movement of the merchandise since they assisted in its purchase and in its transfer from the custody of the carriers to its final destination in the partnership warehouse where the transportation from state to state came to an end" (161 F. 2d at 570)).

Most of the decisions which petitioner cites as in conflict with the holding below not only antedated this Court's *Jacksonville Paper Co.* decision, but also (with the two exceptions discussed *infra*) did not deal with the specific question here presented—they were concerned with the question whether goods remained in commerce throughout a further journey ***beyond the warehouse,*** and not with the question "where, ***within*** the warehouse, the goods come to rest" (see opinion below, Pet. 16; emphasis the court's). The only pertinent Court of Appeals decision cited by petitioner is *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (C.A. 7), certiorari denied, 318 U.S. 757, decided before *Jacksonville Paper*;[1] and even there, as the

[1] As a subsequent Third Circuit decision pointed out, "the court in that case [*Goldblatt*] did not have the advantage of the guidance given by the Supreme Court decisions of *Walling* v. *Jacksonville Paper Company* and *Higgins* v. *Carr Brothers Company* * * *." *Walling* v. *American Stores Co.*, 133 F. 2d 840, 846 (C.A. 3).

opinion below points out (Pet. 16), "the court's attention seems to have been focused on the question of whether the goods came to rest at the warehouse, or only later at the retail stores to which they were eventually delivered", and, "[i]f the court did specifically consider the present question, it at least gave no reason why the line should be drawn at the point where the goods entered the building." And, as the court below evidently concluded, its own decision in *Walling* v. *Silver Bros. Co.*, 136 F. 2d 168, which petitioner asserts to be "directly contrary" to the decision in the instant case (Pet. 7), also did not specifically consider the present question, but was concerned with employees who handled the goods in connection with their duties to "prepare them for local shipments", *i.e.*, only *after* they had been unloaded and placed in stock in the warehouse by other employees of the company.

The only other decisions cited by petitioner which dealt with the question here at issue are those of the district court in *Mitchell* v. *C. & P. Shoe Corp.*, 14 WH Cases 241 (S.D. Fla., 1959, not officially reported) and of the Puerto Rico Supreme Court in *Ortiz* v. *Sucrs. de A. Mayol & Co.*, 78 P.R. 534. The *C. & P. Shoe Corp.* case is now pending on appeal before the Fifth Circuit, and, because its facts differ substantially from those presented here, may well be decided on different grounds on the appeal.[3] In the

[3] The *C. & P. Shoe* case involves a warehouse for a chain of stores, *i.e.*, the shoes are purchased for delivery exclusively to the warehouse's affiliated group of retail stores. The courts of appeals, following this Court's decisions in *Jacksonville*

Ortiz case, the Supreme Court of Puerto Rico relied heavily upon *Walling* v. *L. Wiemann Co.*, 138 F. 2d 602 (C.A. 7), certiorari denied, 321 U.S. 785, which was in effect overruled by this Court's subsequent decision in *Phillips Co.* v. *Walling*, 324 U.S. 490,[4] and, in addition, upon the mistaken view that the Administrator had rescinded his long-standing interpretation that warehouse employees "engaged in * * * the stor-

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Paper, *supra*, and *Phillips Co.* v. *Walling*, 324 U.S. 490, have consistently held that "[g]oods purchased by a chain store system outside the state, as intended stock for its various stores, are not taken out of the stream of commerce by being sent temporarily to a warehouse, as a means of facilitating their systematic distribution to the several stores in accordance with regular needs." *McComb* v. *Wyandotte Furniture Co.*, 169 F. 2d 766, 768 (C.A. 8); and see *Walling* v. *American Stores Co.*, 133 F. 2d 840 (C.A. 3); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C.A. 8); *A. H. Phillips, Inc.* v. *Walling*, 144 F. 2d 102 (C.A. 1), affirmed, 324 U.S. 490; *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d 948 (C.A. 6), certiorari denied, 331 U.S. 811; *Beggs* v. *Kroger Co.*, 167 F. 2d 700 (C.A. 8).

[4] In *Phillips*, this Court noted the existence of a conflict between *Wiemann* and the First Circuit's *Phillips* decision (324 U.S. at 493), and affirmed the latter. While *Phillips* ruled specifically only on the "retail establishment" exemption (§ 13(a)(2) of the Act), it also plainly repudiated the basis of the *Wiemann* ruling against coverage, which, as is evident from the Seventh Circuit's opinion, was inextricably linked with, and rested essentially upon, the assumption that the chain's warehouses "were a part of one concern" and "a mere adjunct to the company's retail establishment" (138 F. 2d at 605). As noted by the Sixth Circuit, the *Phillips* decision "rejects the concept that a retail chain store warehouse is part of or an adjunct to a retail establishment", and "the cases exemplified by the *Phillips* decision hold [that] the wholesale activity of a chain store organization is within the stream of commerce until outside merchandise is delivered to retail stores." *Montgomery Ward & Co.* v. *Antis*, 158 F. 2d at 950, 951.

ing of the goods on the shelves or bins" within the warehouse, as well as "the checking of out-of-state goods on the unloading platform and the removal of the goods from the platform into the interior of the warehouse[,] are usually so immediately and closely connected with their receipt and unloading" as to be "engaged in interstate commerce within the coverage of the Act" (Wage-Hour Manual, 10:389 and 10:399).[5]

2. The District Court found that petitioner had "failed to establish by a preponderance of the evidence that any of the employees in question met the tests established by the Administrator in the Regulations promulgated by mandate of Congress under Section 13(a)(1) of the Act (Title 29 U.S.C.A. Sec. 213(a)(1)) to qualify as being employed in a bona fide executive, administrative, professional or local retailing capacity or in the capacity of outside salesman" (R. 364). The Court of Appeals evidently considered this finding warranted by the record, and the petition sets forth no circumstances which would call for review by this Court, particularly in the light of the well-settled principles that the burden of proof of a claimed exemption rests upon the employer asserting it (*Walling* v. *General Industries Co.*, 330 U.S. 545, 548; *Arnold* v. *Ben Kanowsky, Inc.*, 361

[5] Indeed, inasmuch as this interpretation was in effect and outstanding at the time of the enactment of the 1949 Amendments to the Act, it bears the Congressional approval given to the then-outstanding rulings by Section 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. 920). See *Alstate Const. Co.* v. *Durkin*, 345 U.S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255.

U.S. 388, 394) and that exemptions from this Act are to be "narrowly construed" (*Phillips Co.* v. *Walling, supra* 324 U.S., *supra*, at 493; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295–296).

3. Petitioner's objection to the form of the injunction, as the Court of Appeals specifically found, "is without merit" (Pet. 19). The decree fully accords with the standards recognized by this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, and, as the opinion below points out, such a decree is particularly proper where, as here, "[t]he district court's supporting opinion * * * made clear which activities were found to be covered", so that petitioner was "independently advised of what the court means to include" and plainly "understood the scope of the injunction" (Pet. 19).

CONCLUSION

This case raises no problem that has not been properly resolved by the principles of this Court's prior decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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